Congress of the United States

Washington, D.C. 20515

October 26, 2020

The Honorable Eugene Scalia
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA34, Independent Contractor Status Under the *Fair Labor Standards Act*

Dear Secretary Scalia:

We write to urge the Department of Labor (Department or DOL) to withdraw its above-referenced proposal to narrow its interpretation of employee status under the *Fair Labor Standards Act of 1938* (FLSA).[1]

The *Fair Labor Standards Act* (FLSA) has a broad employment standard that ensures its protections are extended to a wide range of workers. The Department's proposal conflicts with the FLSA's text and congressional intent by narrowing the Department's interpretation of who is considered an employee under the Act. This proposal would lead to misclassification, subjecting vulnerable workers to wage theft, placing law-abiding businesses at a competitive disadvantage, and depriving state and federal governments of much-needed tax revenue. We strongly urge the Department to withdraw its harmful proposal.

The Department's proposal to narrow its interpretation of employee status directly conflicts with the FLSA's text and congressional intent

The FLSA is the cornerstone of wage and hour protections, ensuring employees earn a minimum wage, receive premium pay for overtime work, and are protected from child labor. The FLSA defines an "employee" as "any individual employed by an employer",[2] and the term "employ" includes "to suffer or permit to work."[3] The courts have said that an "entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependent on the entity."[4] For decades, the courts and the Department have applied a multi-factor "economic realities" test "to determine whether the worker is economically dependent on the employer (and

[1] 29 U.S.C. 201-219.
[2] 29 U.S.C. 203(e)(1).
[3] 29 U.S.C. 203(g).
[4] *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996).

thus its employee) or is really in business for him or herself (and thus its independent contractor)."[5]

While the articulation of specific factors and the number of factors used varies slightly by court, the following six factors are almost uniformly used in federal Circuit Courts as indicators of economic dependence: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on his or her managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer.[6] Courts look at the totality of circumstances, and no single factor should be given undue weight, especially the control factor.[7] Giving undue weight to the control factor would render this test the common-law control test.

In its proposal, the Department seeks to narrow its interpretation of employee status under the FLSA by creating a new five-factor test.[8] Two factors, the nature and degree of the *worker's* control over the work and the worker's opportunity for profit or loss, are deemed core factors and given undue weight.[9] According to the Department, where the two core factors point toward the same classification, the analysis is virtually complete; an individual who is determining status "may approach the remaining factors and circumstances with skepticism".[10] While the Department seeks to color its test as a "variation" of the economic realities test,[11] in truth, the test effectively rejects the inquiry into economic dependence and instead makes employee status a question of control of specific elements of a job—whether to take a job, and the ability to work for others—by the worker.

The Department's control test is in direct conflict with congressional intent. When establishing the broad "to suffer or permit to work" standard under the FLSA, Congress consciously rejected the narrower common law standard of employment, which turns on the degree to which the employer has control over an employee. Congress instead chose an employment definition "whose striking breadth … stretches the meaning of 'employee'"[12] and requires the Act's "application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."[13] As the Supreme Court has noted,

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[5] Wage and Hour Div., U.S. Dep't of Labor, Adm'r Interp. No. 2015-1, The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors 2.
[6] *Id*. at 4.
[7] *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).
[8] Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60612 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pt. 780, 788, 795).
[9] *Id*.
[10] *Id*. The remaining factors are the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer, and whether the work is part of an integrated unit of production. *Id*. at 60639.
[11] *Id*. at 60612.
[12] *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).
[13] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947).

employment under the FLSA has the "broadest definition that has ever been included in any one act."[14]

Moreover, in passing the FLSA, Congress intended "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation."[15] Such a purpose cannot be met with the Department's narrow control test, which could leave out significant portions of the workforce.

The Department has no statutory authority to narrow coverage under the FLSA or undermine its purpose in this way. Congress has not delegated rulemaking authority to the DOL with respect to the scope of the employment relationship under the FLSA. The Department only has interpretive rule, or guidance, authority on this issue, but such interpretations cannot conflict with the text or intent behind the FLSA, as this proposal does.[16] If the Department seeks to provide the public with clear guidance, as it purports, it should instead reinstate Administrator's Interpretation (AI) No. 2015, which discussed the application of the FLSA's "suffer or permit" standard and made clear that most workers should be classified as employees under the FLSA definition of "employ."[17]

The Department's proposal could cost workers billions of dollars in lost wages each year, but the Department fails to disclose how much

The misclassification of employees is a pervasive issue that undermines the economic security of hardworking Americans and their families. A 2000 DOL-commissioned study found that 10 to 30 percent of firms audited in nine states misclassified at least one of their workers.[18] According to the Internal Revenue's Service's 1984 estimate (the most recent comprehensive misclassification estimate), 15 percent of employers misclassified their employees.[19] Misclassification is most prevalent in industries where employers have a greater financial incentive and leverage to shift costs onto workers or where work is performed in settings where unlawful employment practices are easier to conceal.[20] This includes trucking, construction, janitorial services, home health care, and industries that employ large numbers of undocumented workers.

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[14] *United States v. Rosenwasser*, 323 U.S. 360, 363 n. 3 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black)).

[15] *Powell v. United States Cartridge Co.*, 339 U.S. 497, 510 (1949).

[16] The Department concedes it has no authority to adopt a test based on control: "Accordingly, the Department believes it is legally constrained from adopting the common law control test absent Congressional legislation to amend the FLSA." Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60635.

[17] Wage and Hour Div., U.S. Dep't of Labor, Adm'r Interp. No. 2015-1, The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.

[18] Lalith De Silva, et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., Prepared for the U.S. Department of Labor Employment and Training Administration iii (2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[19] Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* 10 (Aug. 2009), http://www.gao.gov/assets/300/293679.pdf.

[20] Françoise Carré, *(In)dependent Contractor Misclassification*, Economic Policy Institute 6 (2015), http://www.epi.org/publication/independent-contractor-misclassification/.

The Department's proposal would lead to increases in misclassification. Employers using the Department's narrow control test might seek to improperly change their workers' classification from "employee" to "independent contractor" or hire workers as independent contractors where they would otherwise be classified as employees, misclassifying these workers. The Department offers no estimate of the number of workers who would be at risk of misclassification as a result of its proposal.

Employees misclassified under the Department's proposal would be at increased risk of wage theft because, as the Department notes, "the minimum wage and overtime pay requirements of the FLSA would no longer apply to workers who shift from employee status to independent contractor status."[21] This could lead to significant income losses for workers. For example, in 2012 the Wage and Hour Division (WHD) recovered roughly $250,000 in unpaid overtime and minimum wages for 75 workers who were misclassified by a cleaning company[22]—the equivalent of nearly three months of earnings. The Department even signals to employers that its proposal is designed to be a "get out of jail free" card for wage theft, noting that reliance on agency interpretations that have not been invalidated by the courts provide employers with a defense against minimum wage and overtime protections.[23]

Astonishingly, the Department fails to quantify how much workers stand to lose in wages under its proposal, as legally required.[24] The Economic Policy Institute estimates that, if finalized, this proposal will result in at least $3.3 billion in transfers from workers to employers each year. In addition, workers will incur at least $400 million for necessary paperwork associated with being newly misclassified as independent contractors. This means the estimated cost to workers could be at least $3.7 billion annually.[25]

While this proposal would impact the Department's interpretation of employee status under the FLSA, the Department concludes that employers will use the same "classification decisions for purposes of benefits and legal requirements under other federal and state laws."[26] As such, the Department concedes its proposal could leave workers with fewer benefits that are tied to the employment relationship, such as health insurance and retirement contributions.[27] The Department fails to quantify the loss of these benefits. In addition, where employers reclassify

[21] Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60628.
[22] *Skokie Cleaning Business Must Pay $500K In Unpaid Wages, Damages To Workers*, CHICAGO.CBSLOCAL.COM (May 5, 2012), https://chicago.cbslocal.com/2012/05/05/skokie-cleaning-business-must-pay-500k-in-unpaid-wages-damages-to-workers/.
[23]Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60610; 29 U.S.C. 259.
[24] Executive Order 13563 requires agencies to "quantify anticipated present and future benefits and costs as accurately as possible". Exec. Order No. 13563, Improving Regulation and Regulatory Review, 3 C.F.R. § 13563 (2011).
[25] The Economic Policy Institute's estimates are based on the assumption that there will be a 5 percent increase in the number of workers who are independent contractors in their main job as a result of this rule, coupled with other conservative estimates regarding the number of independent contractors in their main job main and workers' pay levels. Economic Policy Institute, Comment Letter on Proposed Rule on Independent Contractor Status Under the Fair Labor Standards Act (forthcoming Oct. 26, 2020).
[26] Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60627 n. 88.
[27] *Id*. at 60626.

employees as independent contractors, such workers could be denied protections under key federal employment laws, such as health and safety protections under the *Occupational Health and Safety Act*. The Department fails to consider these impacts.

The proposal could also undermine child labor standards in the FLSA that keep our nation's children safe and healthy. The Department also fails to acknowledge or quantify its proposal's potential impact on other protections that rely on the FLSA's definition of employment, including equal pay claims under the *Equal Pay Act of 1963*, paid leave protections under the *Families First Response to Coronavirus Act*, and unpaid family and medical leave protections under the *Family and Medical Leave Act*.

The Department's proposal could cost our economy billions when businesses and states are already struggling to make it through a public health crisis and economic downturn

The Department's proposal would provide low-road employers with a free pass to continue or adopt a misclassification model. Employers who misclassify their workers can achieve significant labor cost savings—nearly 30 percent[28]—by avoiding compliance with minimum wage and overtime obligations as well as payment of employment taxes and workers' compensation premiums.[29] This creates a competitive disadvantage for law-abiding businesses that properly classify their workers as employees and comply with FLSA requirements. In passing the FLSA, Congress sought "to eliminate the competitive advantage enjoyed by goods produced under substandard conditions."[30] This proposal would undermine that goal. Moreover, the Department offers no estimate of how its proposal would cost law-abiding businesses who will have to compete with misclassifying employers.

This proposal could also impose a significant financial burden for federal, state, and local governments due to billions in lost tax revenues. According to a 2009 GAO report, the Internal Revenue Service (IRS) estimated that in 1984, roughly 15 percent of employers misclassified 3.4 million workers, costing the federal government $1.6 billion in lost revenue[31] ($3.72 billion in 2019 dollars). Nearly 60 percent of this lost revenue was attributable to misclassified workers failing to pay income taxes. If employers rely on this proposal to misclassify their workers, state and local governments could see reduced revenues.

Misclassification also negatively impacts key labor insurance programs, such as unemployment insurance, workers' compensation, and disability insurance systems. For example, a 2000 DOL-commissioned study found nearly $200 million in lost unemployment insurance tax revenue per year through the 1990s due to misclassification. During that time period, annually, an estimated

[28] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Sept. 2017), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries/.
[29] Carré, *(In)dependent Contractor Misclassification* at 4.
[30] The FLSA states "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . constitutes an unfair method of competition in commerce". 29 U.S.C. 202(a).
[31] U.S. General Accounting Office, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention 10 (August 2009), http://www.gao.gov/products/GAO-09-717.

80,000 workers entitled to UI benefits were not receiving them.[32] The Department fails to quantify or include any analysis on these potential impacts. The Economic Policy Institute estimates at least $750 million in transfers from social insurance funds to employers each year if this proposal is finalized.[33]

During the current pandemic, millions of small businesses across the country are struggling to stay afloat. State and local governments are struggling to meet budget demands with lowered revenues and increased demand for public services and social insurance programs. This proposal would only exacerbate these conditions in our local communities.

The Department is ignoring rulemaking requirements in its attempt to hurriedly push through its harmful proposal

Unfortunately, this Department is once again cutting corners to push through a rule that would leave workers worse off. According to reporting from Bloomberg, the Department is attempting to complete this rule before the end of the year.[34] We question how the Department could so quickly push through such a significant rule without disregarding rulemaking standards that require full public comment, consideration of such comments, and a careful consideration of the economic impact to workers—a responsibility the Department has repeatedly failed to fulfill in previous rulemakings.[35] The Department has already strayed from rulemaking requirements by providing for only a 30-day comment period, rather than the legally required 60-day comment period.[36] And, as noted above, the Department has failed to include in its proposal legally required estimates of the impact of its rule to workers, businesses, and federal, state, and local governments.

[32] de Silva, *supra* note 18, at 69.
[33] Economic Policy Institute, Comment Letter on Proposed Rule on Independent Contractor Status Under the Fair Labor Standards Act (forthcoming Oct. 26, 2020).
[34] Ben Penn, *DOL Aims to Fast-Track Worker Classification Rule to 2020 Finish* (July 2, 2020), https://news.bloomberglaw.com/daily-labor-report/dol-aims-to-fast-track-worker-classification-rule-to-2020-finish; Ben Penn, *Trump Independent Contractor Rule Stalled by Agency Discord* (Aug. 13, 2020), https://www.bgov.com/core/news/#!/articles/QF0OTCDWRGG1.
[35] *See, e.g.*, Ben Penn, *Labor Dept. Ditches Data on Worker Tips Retained by Businesses*, BLOOMBERG LAW (Feb. 1, 2018), https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses; Suzy Khimm, *Trump administration's rollback of worker protection rules is under investigation*, NBC NEWS (Jan. 31, 2019), https://www.nbcnews.com/politics/white-house/trump-administration-s-rollback-worker-protection-rules-under-investigation-n964836; Benn Penn, *Judge Blocks Labor Department's Narrowed Joint Employer Test*, BLOOMBERG LAW (Sept. 8, 2020), https://news.bloomberglaw.com/daily-labor-report/judge-shoots-down-part-of-labor-department-joint-employer-rule.
[36] Under section 2(b) of Executive Order 13563, Improving Regulation and Regulatory Review, the Department must "afford the public a meaningful opportunity to comment . . . with a comment period that should generally be at least 60 days." Exec. Order No. 13563, Improving Regulation and Regulatory Review, 3 C.F.R. § 13563 (2011).

For these reasons, we strongly urge the Department to withdraw its harmful proposal.

Sincerely

ROBERT C. "BOBBY" SCOTT
Chairman

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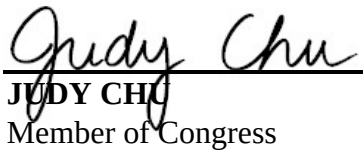

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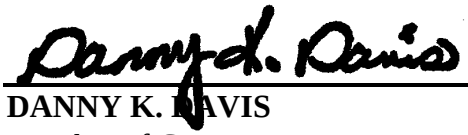

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